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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant-Petitioner,

v.

GEORGE TRIBBLE,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. The proper allocation of burdens and order of presentation of proof under the Age Discrimination and Employment Act is one well established by this Court and does not warrant further consideration.

II. Under *Texas Department of Community Affairs v. Burdine*, the Plaintiff produces evidence of age discrimination in his prima facie case which, after Defendant's rebuttal, is submitted to the trier of fact.

III. The Eighth Circuit Court of Appeals did not err in holding that a case is submissible to the trier of fact when the employer rebuts the employee's prima facie case by articulating a legitimate, nondiscriminatory reason for the employee's discharge.

IV. The Eighth Circuit was not in conflict with decisions of other Circuit Courts of Appeals in holding that a sixty-three year old employee who was forced to resign under protest, or be fired had established a prima facie case of age discrimination.

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Defendant-Petitioner,

v.

George Tribble,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is published at 669 F.2d 1193 and is reproduced in Appendix A to the Petition. The Opinion of the District Court is reported at 508 F.Supp. 14 and is reproduced in Appendix B to the Petition.

STATEMENT OF THE CASE

Plaintiff filed an action in the United States District Court of the Eastern District of Missouri, alleging that he was discharged and forced to retire and resign from Westinghouse Electric Corporation's (hereinafter "Westinghouse") employ, in violation of the Age Discrimination in Employment Act. Plaintiff invoked jurisdiction of the District Court pursuant to 28 U.S.C. §1343 and 29 U.S.C. §621 *et seq.* A jury returned a verdict in favor of Plaintiff for $55,710.00 in actual damages, which was reduced by a remittiture of $11,275.00 filed by Plaintiff. Upon appeal to the Court of Appeals for the Eighth Circuit the judgment of the district court was affirmed.

Plaintiff was continuously employed by Defendant from 1964 until July 31, 1978. In December, 1977 Plaintiff was first informed of his termination. He was asked to sign an early retirement form which Plaintiff did not sign at that time. Because of an illness Plaintiff remained employed by Defendant until he was given his alternative on July 28, 1978. The alternative Plaintiff was given was to either resign July 31, 1978 or face termination on August 1, 1978. Plaintiff chose to resign "under protest."

From December, 1977 when Plaintiff first heard of his termination to July 31, 1978 he applied for four separate positions in Defendant corporation. Although Plaintiff was qualified for each position, all four were filled by younger, less qualified persons.

Specifically, the facts pertaining to each job are discussed below:

1. *Chicago Job.* The man who filled this job had no experience as a business development representative (Tr. 310). Plaintiff had over ten (10) years of direct experience in the job of business development representative. This was the same type of

job Plaintiff held prior to his termination. Plaintiff was not offered the position and was not even considered for the job (Tr. 93, 310).

2. *Kansas City Job.* Defendant asserted that Plaintiff was not qualified for this job because he did not have a college education (Tr. 198). However, the man who was hired for the position did not have a college degree (Tr. 338). Defendant acknowledged that Plaintiff's area of expertise was in heating and air conditioning (Tr. 280). The man hired for the job had only four years of limited experience in heating and air conditioning and was not familiar with the geographical area. Plaintiff was not offered this job and his written requests concerning it were not answered by Defendant.

3. *Florida Job.* Although the job title was different, this job was the same as that held by the plaintiff. (Tr. 11, 205, 218, 244). Defendant did not contact or interview Plaintiff for the position which was filled one month before Plaintiff was forced to resign (Tr. 214).

4. *St. Louis Job.* As a generalist, Plaintiff had a working knowledge of the lamp division and could have filled this position (Tr. 189). In fact, Tribble had assisted the lamp division representative in attempting to make a sale (Tr. 79). The company hired a 28 year old man from outside the company for this job (Tr. 11, 77).

Petitioners contend that Plaintiff failed to produce sufficient evidence at trial to establish age discrimination. However, the District Court and the Eighth Circuit held there was sufficient evidence to establish age discrimination.

There is nothing in the Eighth Circuit's decision to warrant consideration by this Court. The Eighth Circuit's decision is not in conflict with any of the decisions of this Court or any of the circuit courts of appeals. This Court granted certiorari in

Furnco Construction Co. v. Waters, 98 S.Ct. 2943 (1978) to resolve "important questions raised by [Furnco] regarding the exact scope of the prima facie case: in age discrimination cases" and the "nature of the evidence necessary to rebut such a case." *Furnco* at 2945-2946, 2948. The Eighth Circuit has followed the decisions articulated by this Court and this appeal does not raise any novel questions regarding age discrimination that are of public concern or are of any importance to justify review by this Court.

REASONS FOR DENYING THE WRIT

The Eighth Circuit correctly decided the issues and its decision is not in conflict with any decisions of this Court or of any other Federal Court of Appeals.

I.

The proper allocation of burdens and order of presentation of proof under the Age Discrimination and Employment Act are well established following a line of decisions by this Court and need not be reviewed.

This Court is once again faced with the question of what burdens are placed on Plaintiff and Defendant in a cause of action brought under the ADEA. The Court has previously provided the answer to this question by reiterating principles established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

The principles established in *McDonnell Douglas* have been laid down in subsequent decisions by this Court, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keane State College v. Sweeney*, 439 U.S. 24 (1979); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978) and have consistently been applied to age discrimination cases by "virtually" all the Courts of Appeals. (Petitioner's Brief, p. 9). In *Lorillard v. Pons*, 343 U.S. 575 (1978) the Court noted that "the [substantive] prohibitions of the ADEA were derived in *Haec Verba* from Title VII". *Lorillard* at p. 584.

In short, this Court established the order and allocations of burdens of proof for Plaintiff and Defendant under the ADEA in *McDonnell Douglas*. These principles have been adhered to by this Court and the Courts of Appeals in subsequent decisions and there is no need for the Court's review.

II.

The Eighth Circuit was consistent with *Texas Department of Community Affairs v. Burdine* in holding that when the employer rebuts the employee's prima facie case by articulating a legitimate, nondiscriminatory reason for the employee's discharge a genuine issue of fact is raised and the case is submissible to the trier of fact.

In *Tribble,* Westinghouse appealed contending the District Court erred in denying its Motion for a Directed Verdict or in the Alternative a Motion for a New Trial. Petitioners believe *Burdine* holds once the employer rebuts the employee's prima facie case by articulating a legitimate nondiscriminatory reason and the Plaintiff does not then come forward with evidence to show the employer's reasons were pretextual, the employer is entitled to a directed verdict. This is not what *Burdine* holds.

Under the principles enumerated in *Burdine* the Plaintiff retains the burden of persuading the trier of fact that age was a determining factor in his discharge or failure to maintain employment. *Burdine* at p. 253. The Plaintiff prevails if he persuades *the trier of fact* that an employer's decision was more likely based on an unlawful motivation such as age. "The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the Court expeditiously and fairly to the ultimate question." *Burdine* at p. 253.

The prima facie case creates a rebuttable presumption that the employer unlawfully discriminated against the employee. An inference of discrimination is raised "only because we presume these facts if otherwise unexplained are more likely than not based on a consideration of impermissible factors." *Burdine* at p. 254 quoting *Furnco* at p. 577. If the employer is silent after the Plaintiff proves his prima facie case, and the trier of fact believes the Plaintiff's evidence, then the Plaintiff is entitled to a verdict because "no issue of fact remains in the case." *Id.*

The burden that shifts to the Defendant is to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for rejecting the Plaintiff. In *Sweeney* and *Burdine* this Court held that "articulate" did not mean "proving". *Burdine*, at 253; *Sweeney*, at 25. The Defendant need only present evidence which raises a genuine issue of fact whether or not the Plaintiff was a victim of discrimination. *Burdine* at 254, 255. If the Defendant meets this burden the Plaintiff's presumption is rebutted and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255.

It is at this stage of the proceeding that Petitioner is confused. By rebutting the Plaintiff's presumption of discrimination the Defendant is not entitled to a directed verdict. *Burdine* noted that by rebutting the presumption, "we do not mean to imply that the trier of fact no longer may consider evidence previously introduced by the Plaintiff to establish a prima facie case." *Id.* at 255 no. 10. The Court continued:

> [N]onetheless the evidence and inferences [plaintiff's prima facie case] properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed there may be some cases where the plaintiff's initial evidence combined with effective cross examination of the defendant will suffice to discredit the defendant's explanation. *Id.*

Thus, when the Defendant has rebutted the Plaintiff's presumption, the evidence from the prima facie case is not per force dropped from the trier of fact's deliberations.

The Eighth Circuit adhered to these principles and the reasoning behind them. Plaintiff presented his prima facie case, creating a presumption of discrimination against the Defendant. The

Defendant offered evidence of a legitimate nondiscriminatory reason for discharging Plaintiff. At this stage, the trier of fact could still "find that the wrong occurred in the manner established by the plaintiff." *Tribble v. Westinghouse*, 669 F.2d 1193, 27 F.E.P. Cases 1596, 1598 (8th Cir. 1982).

The rebuttal raised a genuine issue of fact as to whether Defendant discriminated against Plaintiff on the basis of age. The trier of fact could have believed either side. The jury accepted Plaintiff's version and the Eighth Circuit affirmed.

Petitioners contend Plaintiff failed to produce sufficient evidence to prove discrimination. Plaintiff relied on the evidence proffered in his prima facie case and evidence produced on cross examination of Defendant's witnesses.

Specifically, Respondent established that during the interim betweeen Plaintiff's notification of his termination and the termination date, Plaintiff applied for a number of jobs within Defendant organization. Plaintiff was sufficiently qualified for each position. Each position was filled by a younger, less qualified person. Plaintiff chose early retirement over protest one day before his termination date because he would have been discharged otherwise. This was sufficient evidence for the jury to infer that it was more likely true than not that Plaintiff was discriminated against because of his age.

Quite simply, this case involved the trier of fact hearing all the evidence, weighing that evidence, and determining that Tribble was discriminated against due to age. This case raises no weighty issues worthy of Supreme Court consideration.

III.

The decision of the Eighth Circuit is not in conflict with the decisions of this Court or the courts of appeals in holding that an ADEA case is submissible to the trier of fact after the Plaintiff presents its prima facie case and the Defendant articulates a legitimate nondiscriminatory reason for its actions.

Petitioner claims that the Eighth Circuit's opinion is in conflict with decisions from other circuits. An analysis of these cases supports a contrary conclusion.

In *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980) the Fourth Circuit affirmed the District Court's granting Defendant's Motion for Judgment Notwithstanding the Verdict. The trial court granted Defendant's Motion because the Plaintiff had not presented enough evidence to establish an inference of age discrimination on the part of the employer. At trial, there was an overwhelming amount of evidence regarding Smith's incompetency.

The only evidence that raised an inference of discrimination was Smith's own testimony which the trial court ruled irrelevant. *Id.* at 1066. However, even in *Smith* the Appeals Court stated that:

> . . . the question should not be taken from the jury *if there is evidence in a case which if accepted by the jury* would support a finding that age was a determining factor in the discharge but we conclude there is insufficient evidence to support such a finding in this case. *Id.* (emphasis supplied)

In *Tribble* there was ample evidence that Tribble was qualified for other positions throughout Defendant's organization. These positions were filled by younger, less qualified persons after Tribble had applied for them. The Eighth Circuit believed that this fact and others were sufficient so that "the jury could infer that the reason for Plaintiff's discharge was age." *Tribble* at 1599.

The other cases cited by Petitioner do not rise to the level of conflicts between the circuits, rather they deal with the question of quantitative evidence. In *Simmons v. McGuffy Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980), *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980) and *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d (6th Cir. 1982) all the Courts found insufficient evidence to warrant submission of a genuine issue of material fact to the trier of fact.

These cases do not represent a conflict between circuits, they represent a difference in the quantity and quality of evidence. If these cases stand for conflict between circuits, then this Court will be required to review all cases in which the jury could have found for one party or the other—hardly within the province of the Supreme Court.

IV.

The Eighth Circuit was consistent with the decisions of other Courts of Appeals in holding that a 63 year old employee who was forced to retire or be fired had established a prima facie case of age discrimination.

In its final point for review, the Petitioner again attempts to couch quantity of the evidence issues under the guise of a failure to present a prima facie case and conflict among circuits.

Petitioner contends the Plaintiff failed to establish a prima facie case because he did not produce any evidence that he was qualified for the jobs for which he applied and he did not apply for two jobs.[1] (Petitioner's Brief p. 19). Petitioner is again mistaken. Plaintiff is a member of the protected class. After Plain-

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[1]Interestingly, it was Petitioner who in its defense attempted to insulate itself by making much of its Key Personnel Service Department in Pittsburgh which allegedly sought to place individuals displaced by reorganization. In essence saying, "there is no need to apply for jobs, we will locate employment for you." See also footnote [3] *infra*.

tiff was discharged he applied for and was rejected, or not even considered by Defendant, for positions similar to the one he previously held in Defendant organization.[2] These positions were subsequently filled by younger, less qualified persons. The Eighth Circuit and the District Court recognized the sufficiency of Plaintiff's evidence. In short, Plaintiff met and proved the criterion this Court outlined in *McDonnell Douglas, supra.*

Petitioner also contends Plaintiff failed to establish a prima facie case of discriminatory discharge, citing *Cova v. Coca Cola Bottling Co.*, 674 F.2d 958 (8th Cir. 1978).

Specifically, Petitioner contends Plaintiff failed to establish a prima facie case because his job did not remain open and he was not replaced by a younger person. (Petitioner's Brief, p. 19).

In *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 5 F.E.P. 355 (2nd Cir. 1981) the Second Circuit held that Plaintiff had failed to make out a discrimination case under *McDonnell Douglas* since "he did not prove that he was replaced after the discharge, or even that the position was kept open." *Stanojev* 25 F.E.P. at 259. Petitioner has glossed over the facts of this case in asserting its similarity to *Tribble.* Stanojev's position was Vice President of Special Assignments. The position never existed before or after Stanojev held it. This position was created simply to keep Stanojev after he had been demoted from his previous position. Further, Stanojev never sought another position after he was discharged from Vice President of Special Assignments. Stanojev's position was eliminated after he was discharged because it never was an official position. It was Stanojev's incompetence that eliminated the position not a

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[2]One must be cognizant that the jury was presented with evidence of four job openings, the jury could have found that Tribble was qualified for any *one* of these jobs. We will never know if the jury considered Tribble qualified for one or all four.

corporate reorganization 25 F.E.P. at 359. Accordingly the Second Circuit held that "Stanojev had not proved anything other than a legitimate reason i.e. elimination of the position as his own incompetence. Therefore an inference of discrimination could never be raised in this matter." *Id.*

Tribble's job was eliminated in a corporate effort to cut costs. It was not eliminated because of his incompetence. Tribble sought similar positions to the one from which he was discharged within Defendant's organization which were subsequently filled by younger, less qualified individuals.

In *Sahadi v. Reynolds Chemical,* 636 F.2d 1116 (6th Cir. 1980) the Sixth Circuit affirmed the lower Court holding that Plaintiff had failed to establish a prima facie case because "there were no facts in the record from which the jury could reach the conclusion that age discrimination occurred unless they were allowed to indulge in guess and speculation." *Sahadi,* at 1117. Sahadi's job was eliminated in order to cut costs. After Sahadi was discharged his job did not remain open. The decision was to eliminate a separate position of "color matchers". His duties were assumed by a more skilled employee who was also within the protected age group under the ADEA. The Sixth Circuit held that under all the evidence presented at trial "there was simply no reasonable inference to suggest that the plaintiff was discriminated against because of age." *Id.*

Tribble's position was eliminated altogether. His duties were assumed by no one. Tribble applied for jobs similar to the one he was discharged from. They were filled by younger, less qualified persons. Under these circumstances the trial court and the Eighth Circuit believed there was sufficient evidence to raise an inference of age discrimination.

In discussing various reasons for discharge the *Sahadi* Court noted that "age would not have to be the sole reason but only a contributing factor in connection with the discharge". *Id.* The

ultimate fact to be decided is the same burden the Plaintiff retains throughout the case. Plaintiff must ultimately prove age was a factor in his discharge. However, the Plaintiff in *Sahadi* failed to do this. Tribble unquestionably produced sufficient evidence to raise an inference that age was a determining factor in connection with his discharge.

In *Price v. Maryland Casualty Co.*, 561 F.2d 609, 16 F.E.P. 84 (5th Cir. 1977), a corporate division of Maryland Casualty was not performing up to expected levels. A decision was made that one of the three representatives would have to be eliminated to match costs with revenues. Price was chosen because he "was the most expendable of the three". *Price* at 86. In affirming the District Court, the Fifth Circuit noted that the decision to discharge Price was based on evidence of company records that showed Price was not generating as much business as the other two. The Defendant's decision was to eliminate the lowest performer.

Tribble was not discharged for low performance. Tribble's position was eliminated due to corporate reorganization. These are distinct fact patterns.

Petitioner contends the Eighth Circuit failed to recognize that when a position is eliminated in a company a similar vacant position need not be filled by the discharged employee. (Petitioner's Brief, p. 21). Rather, as Petitioner points out the company may choose the more qualified person. The Eighth Circuit also recognized this fact. Plaintiff produced sufficient evidence to show he was qualified for the jobs. The evidence showed he was more qualified than the persons who received the jobs. The company hired younger, less qualified persons. The trier of fact believed the decision to terminate Tribble was on the basis of age. The Eight Circuit held there was sufficient evidence for the trier of fact to decide such a factual question.

Finally, Petitioner is mistaken in contending the Sixth Circuit in *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th

Cir. 1982) held that giving an employee the choice between early retirement and termination does not constitute an element of the prima facie case under the ADEA. (Petitioner's Brief, p. 22). The Sixth Circuit affirmed the District Court's holding that *Ackerman* had failed to establish a prima facie case because Ackerman voluntarily resigned instead of being discharged. Whether election of early retirement over discharge was the basis for the Sixth Circuit's decision is not at issue in *Tribble*. Tribble did not voluntarily retire. Tribble was faced with a Hobson's choice—either retire or be discharged. An employer is not free to mask discharge under the rubric of a so-called early retirement. This Court need not establish any guidelines because Tribble was given a choice—retire or be fired. Thus, no issue is raised requiring the establishment of guidelines to deal with cases concerning election of early retirement.

In short, this case presents no new questions or novel issues before the Supreme Court. The Supreme Court established these guidelines in *McDonnell Douglas* and *Burdine*. The Eighth Circuit adhered to the procedures and purpose behind those decisions. The District Court and the Eighth Circuit both held that the Defendant and the Plaintiff had produced sufficient evidence for the trier of fact to hold that the corporate reorganization as well as age could have been the determining factor in the Plaintiff's discharge. The trier of fact decided that age was the determining factor in the Plaintiff's discharge and accordingly found for the Plaintiff.

CONCLUSION

For the foregoing reason , the Petition for a Writ of Certiorari should be denied.

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